

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MADONNA GRACE HOLDEN,

Plaintiff-Appellee,

v

DANIEL KANE HOLDEN,

Defendant-Appellant.

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UNPUBLISHED

June 10, 2014

No. 314622

Oakland Circuit Court

Family Division

LC No. 2010-767427-DO

Before: WILDER, P.J., and SAAD and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right from an order granting plaintiff's motion for relief from judgment. In that order, the trial court ordered defendant to pay \$75,449 to plaintiff for the exercise of her stock options, attorney fees totaling \$10,774, and expert fees totaling \$3,179.10. We decline to address defendant's argument that the trial court erred in finding that he was in contempt of a prior mutual temporary restraining order; instead, we limit our review to whether the trial court abused its discretion in awarding attorney fees and costs. Finding no errors warranting reversal, we affirm.

**I. BASIC FACTS AND PROCEDURAL HISTORY**

On January 20, 2010, the trial court entered an ex parte mutual temporary restraining order, prohibiting the parties from "selling, purchasing, assigning, transferring, encumbering, concealing, or otherwise disposing of any property of the parties whether titled in the names of either or both parties, including but not limited to: vehicles; savings accounts; investment accounts with Ameritrade, Fidelity and any other source; pension benefits; and, real property." The order specifically warned that "[v]iolations of this Order subject you to the contempt powers of the Court" and that the order remained "in effect until modified or further order of the court."

On March 17, 2011, the trial court entered a consent judgment of divorce. The judgment awarded plaintiff a 50 percent interest in the unexercised Ford Motor Company stock options granted to defendant. The judgment provided:

- a. Plaintiff is entitled to designate the date on which her share of the options, or any number of them, shall be exercised, and Defendant, on reasonable notice in writing from Plaintiff of not less than five business days before the designated

exercise date, shall cooperate in timely executing Plaintiff's directions. Defendant shall provide Plaintiff the written confirmation of exercise he receives for any exercise of Plaintiff's share of the options.

b. Defendant shall provide actual notice to Plaintiff of his intent to exercise any of his share of the options at least five business days before date of such exercise. His notice shall include the number of options he intends to exercise.

c. *For the ISO options*, Plaintiff shall pay Defendant the option price at least five business days before the date on which she has requested Defendant exercise the options and, further, Defendant shall transfer to Plaintiff the shares of stock resulting from exercise of the options within five business days of his receipt of same. Plaintiff shall be obligated to hold such stock shares for at least one year after exercise date.

More than a year later, on August 20, 2012, plaintiff filed a motion for relief from judgment, alleging that defendant had exercised some of the Ford stock options two months before the entry of the judgment of divorce. Plaintiff discovered a January 11, 2011 wire deposit to defendant from Ford totaling \$74,448.99. Plaintiff argued that defendant "knowingly concealed and actively deceived both Plaintiff and the Court regarding his receipt of these funds[.]" in violation of the temporary restraining order. Plaintiff also discovered that defendant received interest on United States savings bonds that were previously undisclosed.

The trial court ordered an evidentiary hearing to determine whether defendant violated the temporary restraining order and to address whether he was aware of savings bonds before the entry of the judgment of divorce. Defendant moved for reconsideration, arguing that the temporary restraining order was extinguished at the time the trial court entered the judgment of divorce and, consequently, the trial court lacked jurisdiction to award damages for violation of the temporary restraining order. The trial court denied defendant's motion and an evidentiary hearing took place on December 11, 2012.

At the hearing, the parties stipulated that defendant would pay plaintiff \$7,151.66 for the undisclosed savings bonds. Defense counsel conceded that defendant violated the temporary restraining order by exercising some of his stock options before the entry of the judgment of divorce. However, defense counsel contended that defendant acted in good faith and did not intend to violate the temporary restraining order. Given that defendant admitted that he violated the temporary restraining order when he exercised the stock options before entry of the judgment of divorce, the only remaining issue at the hearing was whether plaintiff suffered any loss or damages as a result of defendant's actions, and, if so, the determination of the total amount of her damages. Plaintiff's counsel argued that defendant not only disposed of marital property in violation of the temporary restraining order, but also deprived plaintiff of the opportunity to participate in the decision to exercise her options at the same time.

Brenda Orlando, a certified public accountant, testified that she performed a forensic examination of defendant's business and personal documents. Orlando discovered stock options that were reported on defendant's 2011 tax return. Defendant exercised the stock options on January 7, 2011, at which time the Ford stock was trading at \$18.02 per share. Defendant

received a net profit of \$117,000. Orlando explained that plaintiff's damages are "the difference between the profit that [defendant] realized, in violation of the mutual restraining order, versus the difference between what he would have realized if he waited in -- upon the entry of the judgment of divorce given the five-day notice." If all of the stock options would have been exercised on January 7, 2011, plaintiff's half would have been \$74,705. If plaintiff had exercised her stock options at the earliest available date permitted by the judgment of divorce, which was March 22, 2011, she would have received \$15,749. This accounted for the January 7, 2011 stock price of \$18.02 per share and the March 22, 2011 stock price of \$14.15 per share.

Orlando's fees totaled \$3,179.10. Plaintiff's counsel stated that her attorney fees totaled \$10,774 in pursuing the matter.

Defendant testified that he did not intend to maximize his return on the stock options to plaintiff's detriment or violate the temporary restraining order. However, defendant did not tell plaintiff that he exercised the stock options.

After taking the matter under advisement, the trial court issued an opinion and order granting plaintiff's motion for relief from judgment. The trial court noted that defendant admitted he violated the temporary restraining order when he exercised the stock options. Defendant sold his shares immediately and paid ordinary income, while plaintiff did not exercise her options because she was waiting for defendant to do so. Plaintiff was prohibited from selling her shares earlier than one year after the judgment of divorce, but defendant could sell his shares at any time. This was for defendant's tax benefit. Defendant had failed to disclose income of \$3,008.75 and the trial court stated that the failure to disclose assets should result in imposition of meaningful sanctions, including an award of actual attorney fees and costs or contempt. The court awarded the \$3,008.75 of undisclosed income by defendant to plaintiff. The trial court further ruled:

Defendant was the fiduciary of the stock options he held for the benefit of both parties in the form of a constructive trust. He had a fiduciary duty to Plaintiff. Specifically, Defendant had a duty to act for Plaintiff's benefit, while subordinating his personal interests to that of Plaintiff.

Based on the evidence presented and the fiduciary duty that Defendant owed to Plaintiff, the court finds that Defendant breached the fiduciary duty owed to Plaintiff and exercised Plaintiff's options on January 7, 2011. As such, he now owes Plaintiff \$75,449 for the exercise of her options. Additionally, based on his contempt of the court's order in effect on January 7, 2011, Defendant's lack of cooperation concerning discovery on the issues in this matter, and based on his failure to disclose the receipt of \$3,008.75 in marital assets, Defendant shall pay Plaintiff's attorney fees totaling \$10,774 and Plaintiff's expert fees totaling \$3,179.

This appeal followed.

## II. APPELLATE JURISDICTION

On appeal, defendant argues that he could not have been found in contempt of the temporary restraining order because the order terminated when the judgment of divorce was entered. This Court lacks jurisdiction to consider the issue.

Defendant filed a claim of appeal with this court from the order that (1) granted plaintiff's motion for relief from judgment; and (2) awarded plaintiff attorney fees and costs in the amount of \$13,953.10. An order granting relief from judgment is not a final order that is appealable as of right under MCR 7.202(6). Likewise, an order finding a party in civil contempt is not a final order appealable as of right. MCL 600.308(2); MCR 7.202(6)(a). However, that portion of the order awarding costs and attorney fees is a postjudgment order that is appealable as a matter of right. MCR 7.202(6)(a)(iv); MCR 7.203(A)(1). Our review is, therefore, limited to only the portion of the order awarding attorney fees and costs and we are precluded from considering defendant's claim that the trial court lacked jurisdiction to find that he was in contempt of the temporary restraining order.. MCR 7.203.

### III. ATTORNEY FEES AND COSTS

Defendant argues the trial court abused its discretion in awarding attorney fees and costs. We disagree.

A trial court's award of attorney fees and expenses is reviewed for an abuse of discretion. *Myland v Myland*, 290 Mich App 691, 701; 804 NW2d 124 (2010). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). This Court reviews findings of fact for clear error and questions of law de novo. *Myland*, 290 Mich App at 702.

MCR 3.206(C) provides:

(1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.

(2) A party who requests attorney fees and expenses must allege facts sufficient to show that

(a) the party is unable to bear the expense of the action, and that the other party is able to pay, or

(b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

"The party requesting the attorney fees has the burden of showing facts sufficient to justify the award." *Woodington v Shokoohi*, 288 Mich App 352, 370; 792 NW2d 63 (2010). Here, plaintiff demonstrated facts sufficient to justify the award of attorney fees totaling \$10,774 and expert fees totaling \$3,179.10. Defendant conceded at the evidentiary hearing that he violated the temporary restraining order by exercising the stock options before entry of the judgment of divorce. As a result of defendant's failure to comply with the temporary restraining order, plaintiff filed a motion for relief from the judgment and requested the trial court award her

attorney fees and costs. On appeal, defendant does not contest the calculation of the attorney fees and expert fees. Therefore, the trial court did not abuse its discretion in awarding attorney fees and costs to plaintiff.

Affirmed.

/s/ Kurtis T. Wilder  
/s/ Henry William Saad  
/s/ Kirsten Frank Kelly